No. 14,552

IN THE

United States Court of Appeals

For the Ninth Circuit

BLAIR HOLDINGS CORPORATION, a Corporation; BLAIR-ROLLINS & CO., INCORPORATED, a Corporation and BLAIR & CO., INC., OF NEW YORK, a Corporation,

Appellants,

vs.

BAY CITY BANK AND TRUST COMPANY, a Corporation,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

Dean Witter & Co., a security brokerage firm, filed in the District Court of the United States for the Northern District of California, Southern Division, an action in interpleader relative to 2000 shares of Blair

Holdings Corporation on deposit with Dean Witter & Co. The shares had been received by Dean Witter & Co. pursuant to certain escrow instructions contained in the following letter and the following stipulation attached thereto:

Law Offices
Phillip Barnett
2810 Russ Building
San Francisco 4
GArfield 1-5108

May 26, 1950

Dean Witter & Co.,
45 Montgomery Street,
San Francisco, California

Attention: Mr. Cronin.

Re: Bay City Bank and Trust Company

Gentlemen:

You are hereby instructed that you shall hold in escrow 2,000 shares of Blair Holdings Corporation stock at no expense to Blair Holdings Corporation, identified by certificate numbers 6201 to 6216, representing 100 shares each and certificates numbers SH 10652, S 13739, N 3931 and NH 1736, representing 100 shares each.

Said escrow is pursuant to that certain stipulation, copy of which is attached hereto, dated May 19, 1950, and which stipulation is in connection with litigation now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, Number 383427, involving Bay City Bank and Trust Company, a corporation, and Blair Holdings Corporation, a corporation.

You shall release these shares in accordance with the provisions contained in said stipulation.

Yours truly,
/s/ Phillip Barnett
Blair Holdings Corporation
By /s/ Henry C. Clausen

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 383427

Bay City Bank and Trust Company, a Corporation,
Plaintiff,
vs.
Blair Holdings Corporation, a Corporation, et al.,
Defendants.

Stipulation

This stipulation is entered into this 19th day of May, 1950, between Bay City Bank and Trust Company, a corporation, referred to as Bay City, and Blair Holdings Corporation, a corporation, referred to as Blair, parties to the above litigation now pending and being presently heard before Mr. George Osborne, Arbitrator, pursuant to Arbitration Agreement dated March 6, 1950, be-

tween above parties and others whose signatures hereto are necessary so as not to affect the terms and conditions of the aforesaid Arbitration Agreement in any particular except to effectuate the purpose and intent of this agreement.

1. Plaintiff Bay City hereby dismisses with prejudice the above-named action against Blair, Jean Lambert, Frank Reed and Virgil D. Dardi, among other things, to enforce the transfer of 20,000 shares of stock held by it as collateral and which transfer has already been effected upon the placing up of a bond.

2. Blair dismisses with prejudice its counterclaim and cross-complaint against Bay City on all causes of action in the action above against said Bay City but reserves and retains as against Crofoot and Rice and Crofoot or Rice all rights and remedies which Blair would otherwise have against Bay City or which may be asserted against Crofoot and Rice or Crofoot or Rice through said Bay City, as agreed to be arbitrated.

3. Blair and Bay City hereby release the other of them and their respective directors, officers, employees, agents and attorneys from any and all claims of every kind and character and description arising out of or incidental to the aforesaid litigation and any litigation now being arbitrated as aforesaid and any transaction described in said litigation and the matters therein set forth excepting as herein specifically reserved and otherwise provided for.

4. Blair stipulates that an order may be entered discharging that certain bond in Action

383427 in the principal amount of $50,000.00 put up under order dated February 8, 1949, as ordered by Honorable Milton T. Sapiro, Judge of the Superior Court, requiring Bay City to indemnify Blair in the event that Blair and others, as stated in said order, shall be damaged by reason of the transfer of said stock, upon the condition that E. J. Crofoot in the aforesaid litigation agrees to guarantee and to indemnify Blair and does hereby guarantee and indemnify Blair and save and hold harmless Blair, up to the extent of $15,000.00, its officers, transfer agents and register agents against any loss, damages or expenses or other liability by reason of the recordation or the transfer or the issuance of new certificates of shares as required by said order, and further agrees to escrow forthwith 2,000 shares of Blair stock in the place and stead of said bond, being the said 2,000 shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot of approximately $35,000.00. Said 2,000 shares of stock shall be left in escrow in the possession of Dean Witter & Company, pending a written order releasing the same on order of Crofoot and Blair or the order or award of said arbitrator directing said release.

5. Nothing in this agreement or stipulation shall in any way alter or amend in any respect the terms or conditions of that written Arbitration Agreement between other parties hereinabove referred to except as herein stated, and E. J. Crofoot and Blair each reserves the right to assert against the other all claims for costs and expenses incurred herein and to which Bay City or

Blair may be entitled as a result of the action between these parties in this agreement and the Arbitrator shall award to Blair or Crofoot, respectively, such damages incurred by Blair or Bay City (through Crofoot) in their action against the other as may have been heretofore provided by said Arbitration Agreement, and Bay City shall be considered withdrawn from said arbitration.

In witness whereof, each of the parties hereto have signed their name this 19th day of May, 1950.

Parties to the Agreement:

Blair Holdings Corporation,

By .....

Bay City Bank and Trust Company,
By /s/ P. R. Homill, President.

I agree to Guarantee as Provided in Paragraph 4.

/s/ E. J. Crofoot.

We, the undersigned, parties to the Arbitration Agreement dated March 6, 1950, hereby consent and agree that the Arbitration now being heard by Mr. George Osborne, pursuant to that written Arbitration Agreement dated the 6th day of March, 1950, shall continue in any and all respects as between us, and the aforesaid mutual releases and stipulation herein contained, shall not affect, alter, modify or in any way change the terms and conditions of said Arbitration Agreement, except as provided above. We hereby con-

sent and agree that said Arbitration shall continue in full force and effect.

Blair Holdings Corporation,
New York City, New York

By .....

Blair-Rollins & Co., Incorporated,
Russ Building, San Francisco

By .....

Blair & Co., Inc., of New York,
Russ Building, San Francisco

By .....

Bay City Bank and Trust Company,
C/O Phillip Barnett, Russ Bldg.,
San Francisco, California
By /s/ P. R. Homill, Pres.;
/s/ E. J. Crofoot
/s/ Paul Rice

.....

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.....

.....

Directors.

Approved by Counsel:
/s/ Phillip Barnett
Keesling & Keesling,
Henry L. Clausen.

The stipulation was executed in counter-part with the result that all parties indicated as signatories have subscribed.

The litigation referred to in the foregoing letter as No. 383427 was a suit instituted by Bay City Bank and Trust Company against Blair Holdings Corporation to compel the transfer upon the books of Blair of 20,000 shares of Blair Holdings Corporation. A cross-complaint filed in such action by Blair Holdings Corporation brought in E. J. Crofoot and Paul Rice as additional parties defendant and alleged that the shares sought to be transferred had previously been owned by Blair Holdings Corporation and had been transferred to Crofoot and Rice in reliance upon fraudulent misrepresentations made by such parties. The cross-complaint prayed for a rescission of the Crofoot and Rice transactions and alleged that the shares sought to be transferred had been received by Bay City Bank by way of pledge from Crofoot, with full knowledge of the facts. In such action an order was made on February 8, 1949 by the Honorable Milton D. Sapiro directing the transfer of the shares upon indemnification of Blair by Bay City Bank in the form of a bond in the principal amount of $50,000. When such action together with five other pending proceedings involving Blair Holdings Corporation and Crofoot and Rice were referred to arbitration the stipulation above set forth was entered into. As it recites mutual dismissals were executed between Blair and Bay City Bank, reserving however, all rights and remedies between the real parties in interest, Blair and Crofoot and Rice. Pursuant to such stipulation the indemnification bond which Bay City Bank had given in accordance with the order of Feb-

ruary 8, 1949 was discharged and the indemnification of Blair for having transferred 20,000 shares was assumed by Crofoot. As the stipulation recites, Crofoot deposited in the escrow account 2,000 shares of Blair Holdings Corporation. The stipulation states that the shares so deposited were shares which had been held by Bay City Bank as collateral for an obligation of Crofoot and which were relinquished to Crofoot by such bank after the loan had been paid from the proceeds of the sale of other shares. The testimony discloses that only 1,600 of such shares had actually been so relinquished to Crofoot by the bank and that 400 of such shares had been loaned to Crofoot by Blair or by Virgil Dardi the then president of Blair Holdings Corporation in order to permit Crofoot to make the deposit in escrow. There is no controversy as to the ruling of Court respecting the disposition of the 400 shares. The 1,600 shares in question held by Dean Witter & Co. in the escrow account stood in "street name".

The interpleader action was prompted by conflicting demands made upon Dean Witter & Co. for delivery of the shares. The first of such demands was a levy of execution made on September 11, 1951 by the Sheriff of the City and County of San Francisco on behalf of Blair Holdings Corporation by virtue of a judgment obtained by Blair against E. J. Crofoot. The levy was upon all monies, credits, effects, debts due and owing E. J. Crofoot.

The second demand was made on November 14, 1951 in the form of a letter from Phillip Barnett

making a claim for 1,600 shares and purporting to do so as attorney for and on behalf of Bay City Bank and also upon his own behalf.

Judgment of Interpleader was entered and the shares were deposited in Court. Trial of the action was had and decision rendered by the Honorable Michael J. Roche declaring Bay City Bank and Trust Company to be the owner in fee of the 1,600 shares of Blair Holdings Corporation.

Blair Holdings Corporation and two Blair subsidiary corporations have appealed from the decision.

SPECIFICATION OF ERRORS.

I. The trial Court erred in declaring Bay City Bank and Trust Company to be the owner in fee of 1,600 shares of Blair Holdings Corporation stock on deposit in Court. The record is clear that Bay City Bank and Trust Company received the said shares by way of pledge from E. J. Crofoot. The law is clear that a pledgee does not take title to property pledged with him, his interest being merely a lien and possession for a limited purpose. Nor does a default in the payment of the obligation secured by the pledge pass title to the pledgee. If any right to the shares remained in Bay City Bank upon the conclusion of proceedings below it was but the same limited right which it previously held and could only be exercised by a foreclosure or sale of the shares to satisfy the unpaid balance of the obligation, with the

excess of the proceeds of sale payable to the pledgor. However the pledgee for good and valuable consideration had relinquished its lien and had by written agreement placed the shares in escrow to be disposed of in accordance with the escrow agreement. The written agreement of the parties is unequivocal and the acceptance of oral testimony contradictory of such agreement is a violation of the parol evidence rule as a matter of substantive law.

II. The findings of fact relative to title to the 1,600 shares of Blair Holdings Corporation deposited in Court are not supported by the evidence.

ARGUMENT.

I. THE TRIAL COURT ERRED IN DECLARING BAY CITY BANK AND TRUST COMPANY THE OWNER IN FEE OF 1600 SHARES BLAIR HOLDINGS CORPORATION.

The manner in which Bay City Bank came into possession of the 20,000 shares of Blair Holdings Corporation is uncontradicted in the record. A promissory note dated 9-16-48 payable to Bay City Bank and Trust Company in the amount of $35,000 had been secured by a pledge of such shares. (Tr. p. 94.) The source of these shares was E. J. Crofoot. (Tr. p. 97.)

The legal effect of such pledge upon the title to the shares is stated generally in 41 Am. Jur. 603 (§27).

> "By the contract of pledge, the pledgor does not part with his general right of property in the

> collateral. The general property therein remains in him, only a special property vests in the pledgee. The pledgee does not acquire an interest in the property except as a security for his debt."

The law of Texas which would seem to be applicable to the transaction is precisely the same as that above quoted. (*San Angelo Hilton Hotel v. B. B. Hail Bldg. Corp.,* 60 S.W. (2d) 1049.) In *Lucketts v. Townsend* (3 Tex. 119) it was held that a pledge does not pass the general property to the pledgee but the possession and use only and that a stipulation that title should become absolute in the pledgee upon default is void.

The law of California should such obtain is equally clear that upon the pledge of shares for a debt, the legal title thereto as between the pledgor and pledgee remains in the former (*Cross v. Eureka Lake, etc.,* 73 C. 302).

It is, therefore, obvious that fee title was never in Bay City Bank.

The shares in question were delivered to Dean Witter & Co. in conjunction with 18,400 additional shares, constituting the block of 20,000 shares which was forwarded by Bay City Bank to be sold for the account of such Bank. The fact that the shares were transmitted to the brokerage firm through Wells Fargo Bank (Tr. p. 52) is not material. The only possible effect of the delivery of the shares to Dean Witter & Co. was to make such firm the agent of Bay

City Bank for the purpose of sale. This would not disturb the legal title in E. J. Crofoot.

Dean Witter & Co. pursuant to instructions sold 18,000 shares and deposited the balance of the proceeds $35,239.96 (Tr. p. 55) to the account of Bay City Bank with the Wells Fargo Bank. (Tr. pp. 59 and 98.) A dividend payment on 2,000 shares ($300.00) was also received by Dean Witter & Co. (Tr. p. 55) and presumably the amount was credited to Bay City Bank. By such sales and credits the promissory note payable to Bay City Bank was satisfied. Any collateral remaining in the possession of the bank or its agent was the property of the pledgor—free of the lien of pledge unless some further obligation was secured by such lien. Payment of the debt extinguishes the lien. (*Cross v. Eureka Lake, etc.,* 73 C. 302.)

The basis of the claim of Bay City Bank and/or Phillip Barnett upon the shares remaining in the possession of Dean Witter & Co. is not clear. It would appear to be stated at page 92 of the transcript:

> "Mr. Robertson: . . . I want to develop Mr. Barnett's claim here in this stock arrangement that he had with the bank, that the balance of shares not needed to liquidate this note would be for his retainer fee, for services rendered."

Apparently the bank and Barnett had agreed to a disposition of shares which neither of them owned. Obviously if there was any legal claim against the balance of the collateral for the payment of an at-

torney's fee it would have to be found in the provisions of the promissory note. The applicable provisions of the note are the following:

> "And if default is made in the payment of this note at its maturity and it is placed in the hands of an attorney for collection or suit is brought on same a sum equal to 10% of the principal and interest hereof shall be added to such principal and interest as attorney or collection fee but in no event shall such attorney or collection fee be less than $10.00."

Such provisions certainly do not authorize the conduct which we have here encountered. They are but the usual undertaking to pay an attorney's fee if by failure or refusal of the maker to discharge his obligation it becomes necessary for the payee to place the matter in the hands of an attorney for collection. That contingency does not exist in this situation. The record indicates that Crofoot cooperated with the payee and authorized the sale of the collateral to pay off the note. The most that he is chargeable with is the cost of sale. The fact that the transfer agent unjustifiably refused to transfer the shares and had to be compelled by Court order was no doing of Crofoot. The action to compel transfer was not the type of action contemplated by the attorney's fee provision of the note. Furthermore the note is not self-determining as to the amount of a fee if one should be warranted. It prescribes a maximum and a minimum which is an obvious indication that the parties contemplated the fixing of the fee by a Court. The fairness of any attorney's fee prescribed is likewise

always a subject for inquiry of Court. No such procedure was here followed. Attorney Barnett merely decided that 1,600 shares of Blair Holdings Corporation were an adequate fee. At present market such shares have a value of $8,200.00. (It should be borne in mind that if a pledged security increases in value the pledgor is entitled to the benefit of the increase. 41 Am. Jur. 604.)

Even should the agreement embodied in the note relative to attorney's fee have been applicable and definite as to amount, confiscation of the shares was not the proper manner of enforcing the lien. Sale of the shares under foreclosure proceedings or under a power of sale, were the only methods by which the title of the pledgor could be divested. And in such event any amount over and above the precise obligation secured by the lien was the property of the pledgor and was returnable to him. The Court below failed to inquire as to the basis for any further claims against the shares over and above the loan, or the extent of such claim or to require any accounting of the shares or of the proceeds of the sale of the shares, if they have been sold by Bay City Bank or Phillip Barnett.

Appellants contend that the proceedings below fail to recognize the nature of a pledge transaction or to comply with legal procedures as to the enforcement of a pledge lien, if any did exist with respect to the 1,600 shares after payment of the note obligation. In addition to the points thus raised appellants urge that the Court failed to properly construe the agree-

ment of the parties. When read and correctly interpreted the stipulation executed by Bay City Bank was as to such party a waiver of any right which it may have had in or to the 1,600 shares. Such agreement of waiver was supported by adequate consideration.

The stipulation was an adjunct of arbitration proceedings entered into for the purpose of resolving six legal actions which were pending between Blair Holdings Corporation and E. J. Crofoot and Paul Rice as principal parties. One of the actions incorporated into the arbitration proceedings was that of Bay City Bank and Trust Company v. Blair Holdings Corporation #383427 in the Superior Court of the State of California in and for the City and County of San Francisco. By such action Bay City Bank had sought to compel the transfer on the books of the corporation of 20,000 shares Blair Holdings Coporation which had been pledged to the bank by Crofoot. To such complaint Blair Holdings Corporation filed a cross-complaint bringing in new parties, Crofoot and Rice, as cross-defendants. The cross-complaint alleged that the shares sought to be transferred had been the property of Blair and had been obtained by Crofoot and Rice through fraudulent misrepresentations. It sought a rescission of the transaction by which the shares had passed from Blair to Crofoot and Rice. It alleged that Bay City Bank had received the shares from Crofoot, with knowledge of the fraudulent transaction. In such action an interlocutory order was made by the Honorable Milton D.

Sapiro directing Blair to transfer the shares in question upon proper indemnification by Bay City Bank. Such order dated February 8, 1949 required a bond in the principal amount of $50,000.00. As the arbitration award witnesses, the charges of fraud against Crofoot and Rice were well founded and consequently Bay City Bank was involved in a substantial law suit. It also stood liable as a principal on the indemnification bond. All parties however realized that the real controversy existed between Blair and Crofoot and Rice. In recognition of such fact the stipulation in evidence was executed. It constitutes a release of Bay City Bank. "Bay City shall be considered withdrawn from said arbitration." (Tr. p. 14.) Mutual releases were given by Blair and Bay City. Crofoot undertook the obligation of the indemnification of Blair for having transferred the shares ". . . upon the condition that E. J. Crofoot in the aforesaid litigation agrees to guarantee and indemnify Blair . . ." (Tr. p. 13.) In fact Crofoot was even required to pay the premium on the bond which Bay City had given. (Tr. p. 86.) Undeniably Bay City Bank received real consideration in the releases from complex litigation which it obtained through the execution of the stipulation. Such consideration was more than adequate to support a waiver of any rights which it may have held to the 1,600 shares remaining in the possession of Dean Witter & Co.

By its execution of the stipulation Bay City Bank subscribed to the statement that the shares escrowed with Dean Witter & Co. were "the said 2,000 shares

of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot . . ." (Tr. p. 13.) Such acknowledgment is a complete waiver and release of whatever rights Bay City might have still held in the shares remaining after satisfaction of the loan. It is a full consent to permit Dean Witter and Co. to release the shares from the agency account and to hold them in the escrow account in accordance with the escrow instruction. There is a finding in the record that these shares stood in "street name". (Tr. p. 36.) In such event no further endorsements were required even to transfer title to the shares, let alone to release a mere lien.

> "A certificate of stock in 'street name' means a certificate issued in the name of an individual and endorsed in blank by him, so that the certificate passes from person to person without any further endorsement by any one else." *Drake-Jones Co. v. Drogseth,* Minn., 246 N.W. 664.

The stipulation is a clear and unequivocal statement of the agreement of the parties. It was designed to confine the proceedings to the real parties in interest and to permit the withdrawal of Bay City Bank. By its terms action 383427 is dismissed. Bay City and Blair give mutual releases and "Bay City shall be considered withdrawn from said arbitration", the bond in action 383427 is discharged "upon the condition that E. J. Crofoot agrees to guaranty and to indemnify Blair" * * * ". . . and further agrees to escrow forthwith 2,000 shares of Blair stock in the place and stead of said bond, being the said 2,000

shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot . . ." The stipulation further provides: "Said 2,000 shares of stock shall be left in escrow in the possession of Dean Witter & Company, pending a written order releasing the same on order of Crofoot and Blair or the order or award of said arbitrator directing said release."

The stipulation is not susceptible of misconstruction. No explanation is necessary and no amount of explanation could convince one that it does not mean what it says. Yet the Court below permitted oral testimony not merely to explain but to contradict the written agreement. It would be difficult to find a more flagrant violation of the parol evidence rule, considering the rule not as a canon of evidence but as a declaration of substantive rights.

The state of the record from what has been considered by the foregoing arguments leaves no room for dispute as to an interest of Crofoot in the 1,600 shares, be that interest free and clear of any lien of Bay City as the written waiver so agrees, or be it a right to the excess proceeds remaining after the proper exercise of any lien of the pledge agreement. Unless this Court countenances the confiscation which was permitted below Crofoot had an interest which was subject to a levy. The law of Texas is explicit as to the propriety of a levy upon the interest of a pledgor: Vernon's Texas Rules of Civil Procedure §643:

> "Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied upon and sold on execution against the person making the pledge, assignment or mortgage subject thereto; and the purchaser shall be entitled to the possession when it is held by the pledgee, assignee or mortgagee, or complying with the conditions of the pledge, assignment or mortgage."

There is no question as to the existence of a claim against Crofoot by Blair. The judgment confirming the award of the arbitrator is in evidence. (Tr. p. 78.) There is no question but that Blair effected a proper levy upon the interest of Crofoot. Counsel for Bay City and Barnett raises only the issue as to the interest of Crofoot:

> "Mr. Robertson: If this stock in Dean Witter is Crofoot's then they can execute on it. That is the whole issue. We say it is not Crofoot's." (Tr. p. 85.)

Appellants contend that by appropriate levy Blair has reached the interest of Crofoot which was never divested.

In the light of all of the foregoing the legal conclusion arrived at below that Bay City Bank and Trust Company is the owner in fee of the 1,600 shares is completely untenable. Such decision is also contrary to the very agreement of the parties that the shares were to be releasd from escrow upon the written order of Crofoot and Blair or the order or award of the Arbitrator directing the release. The Arbi-

trator made no order of release and apparently made no specific award relative to the shares, the net result of his decision being money judgments in favor of Blair and against Crofoot and Rice. The answer of E. J. Crofoot (prepared and signed incidentally by Phillip Barnett) disclaims any interest in or to the shares. By the very agreement of all parties therefore the shares were subject to the order of Blair solely. Such right of disposition was in addition to any right it had created by levy of execution.

The result reached in the Court below is in contravention of any applicable principle of law.

II. THE FINDINGS OF FACT RELATIVE TO TITLE TO THE 1600 SHARES OF BLAIR HOLDINGS CORPORATION DEPOSITED IN COURT ARE NOT SUPPORTED BY THE EVIDENCE.

The Court below made two findings relative to title to the 1,600 shares of Blair Holdings Corporation which are the subject of this controversy. The findings are numbered 8 and 10. Each is unsupported by the evidence in the record.

Finding number 8, while rather loose in its first two sentences, is principally objectionable in its concluding sentence:

> "That neither Bay City Bank nor Phillip Barnett executed any assignment, endorsement or other instrument for the purpose of transferring title to said 1,600 shares of stock and it was not intended by Bay City Bank, Phillip Barnett nor the Blair Parties that title to said stock should

be transferred at the time said stock was escrowed."

The finding first assumes something not in evidence, namely, that title to the shares was in either or both Bay City Bank and Phillip Barnett. We have confuted this false assumption in the first portion of our brief considering the matter as one of law. Factually the only evidence is that the shares were pledged by Crofoot. The legal effect of such transaction would be to leave title in Crofoot.

The finding then ignores the evidence that the shares were in street name (and finding number 5 to such effect). By stating that neither Bay City nor Barnett had executed any assignment, endorsement or other instrument for the purpose of transferring title the finding evidences an unawareness of the legal effect of placing shares in "street name". The same disaffirmance of the execution of any instrument for the purpose of transferring title is contrary to the evidence of the execution of the stipulation. While technically the agreement embodied in the stipulation transferred no "title" it did constitute a waiver of any lien which Bay City might have retained in the shares.

Finding 10 is wholly objectionable, incorrect and contrary to the evidence. It states:

"10. It is a fact that from March 5, 1949 (the date Bay City Bank acquired title to the 20,000 shares of Blair stock as hereinabove stated), to the present time, title to the said 1,600 shares of stock on deposit with Dean Witter & Co. has

never been transferred by Bay City Bank or Phillip Barnett and that the said Dean Witter & Co. held said 1,600 shares of stock at all times for the account of Bay City Bank."

The record is uncontroverted that Bay City Bank never did acquire title to the shares but received them as a pledgee and that no legal proceedings were ever had to disturb the legal title of E. J. Crofoot. The same points raised above relative to the denial of a transfer of interest by Bay City or Barnett are also applicable to this finding.

It should be further noted that both of the objectionable findings are conclusions of law—incorrect conclusions.

Appellants therefore urge that this Honorable Court for the reasons assigned reverse the judgment of the Court below.

Dated, San Francisco, California,
March 16, 1955.

Respectfully submitted,
MARSHALL E. LEAHY,
JOHN F. O'DEA,
Attorneys for Appellants.